SHAHRUL IMAN ABDULLAH v. PACIFIC & ORIENT INSURANCE CO BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
SURAYA OTHMAN JCA
AZIZAH NAWAWI JCA
DARRYL GOON SIEW CHYE J
[CIVIL APPEALS NO: W-02(NCC)(W)-1704-09-2019
& W-02(NCC)(W)-1711-09-2019]
7 OCTOBER 2020

ROAD TRAFFIC: *Insurance – Judgment sum – Accident – Claim for damages – Claimant successfully obtained judgment against owner of motorcycle and rider – Sought to recover judgment sum against insurer – Claimant entered judgment in default ('JID') of appearance against insurer – Whether JID could be impeached – Whether JID affected by want, or excess of jurisdiction or tainted by illegality or breach of rules of natural justice – Whether JID was based on valid and enforceable judgment – Road Transport Act 1987, s. 96(3)*

CIVIL PROCEDURE: *Costs – Principles – Parties successfully defended claims – Whether successful parties entitled to costs – Whether there were special grounds to displace general rule that costs to follow events – Whether orders for costs against successful parties justified*

Following an accident, the claimant brought an action for damages against Yahya bin Yacob, the rider, and Navin Naicker ('insured'), the owner of the motorcycle with registration number BLQ 1049 that collided into the claimant ('liability action'). The motorcycle BLQ 1049 was insured by Pacific & Orient Insurance Co Berhad ('insurer'), who, upon being aware of the suit, appointed solicitors to represent the insured in the liability action and also, applied and was successfully added as a party to the liability action. After the trial, the claimant obtained judgment against the rider and the insured in the liability action and there was no appeal against the judgment. Before the judgment in the liability action was entered, the insurer commenced an originating summons ('OS') against the insured and sought to declare the insurance policy void and unenforceable pursuant to s. 96(3) of the Road Transport Act 1987 ('RTA') on the basis that the accident between the claimant and the rider did not happen. The insurer relied on its adjuster's preliminary report and a statutory declaration affirmed by the insured that the alleged accident did not occur. The insured, notwithstanding his statutory declaration, contested the OS and the declaration and affirmed an affidavit that he did lend the rider his motorcycle BLQ 1049 and denied the contents of his earlier statutory declaration stating that he was told by a representative of the insurer to deny his involvement in the accident and to sign the statutory declaration. After hearing the OS, the High Court found in favour of the insurer and granted the declaration sought. Following the declaration, the insurer withdrew as a party to the liability action, which turned out to

be premature. The insured appealed against the decision in the OS and his appeal was allowed and the Court of Appeal directed the insurer commence an action by way of a writ for the declaration under s. 96(3) of the RTA. Hence, the insurer filed Suit 121 seeking the same declaration that it had sought in the OS. The claimant, after having obtained judgment in the liability action, brought an action against the insurer ('recovery action') wherein, a judgment in default of appearance ('JID') was entered against the insurer. The JID, which was based on the judgment in the claimant's favour in the liability action, was for the insurer to pay the claimant damages in the sum of RM3,032,862.20 plus interest. No application was made by the insurer to set aside the JID. Hence, the insurer filed Suit 332 against the claimant seeking to impeach the JID in the recovery action on the grounds of alleged fraud. The insurer's claims in both Suit 121 and 332 were dismissed by the High Court, giving rise to the two appeals: (i) Appeal 1711, the insurer's appeal against the High Court's refusal to impeach the JID in the recovery action sought in suit 332 and cross-appeal by the insured and the rider against the decision of the High Court ordering costs against them in favour of the insurer in Suit 121, even though the insurer's claim was dismissed; and (ii) Appeal 1704 by the claimant against part of the decision by the High Court Judge ('HCJ') in maintaining the interlocutory injunction granted in Suit 332 and in ordering costs against the claimant despite dismissing the insurer's claim.

Held (dismissing appeal and allowing cross-appeal in Appeal 1711 and allowing appeal in Appeal 1704)
Per Darryl Goon Siew Chye J delivering the judgment of the court:

(1) Suit 121 was commenced by the insurer against the insured and the rider after the claimant obtained the judgment against the insured and the rider in the liability action. Based on the meaning of the operative phrase in s. 96(3), *ie*, '… if before the date liability was incurred …', a declaration under s. 96(3) of the RTA was no longer available after a judgment had been granted in favour of a claimant. (paras 51, 53 & 60)

(2) A final judgment of a High Court may only be set aside and struck out *ex debito justitiae* by another High Court, in the exercise of its inherent jurisdiction, upon grounds of breach of the rules of natural justice, illegality or lack of jurisdiction. The JID was not affected by any want, or excess of jurisdiction or tainted by any other illegality or breach of the rules of natural justice. Further, the fraud alleged by the insurer was in respect of the claim upon which judgment was obtained in the liability action, which remained a valid and enforceable judgment. Therefore, the JID in the recovery action could not be impeached or set aside. (paras 65-69)

(3) An injunction is a remedy and it has to be supported by a valid cause of action. The injunction that was extended would have the indirect effect of precluding the claimant's enforcement of the judgment obtained

in his favour in the liability action against the insurer; leaving aside the issue whether the order in the recovery action was at all necessary in the first place. Upon dismissal of the insurer's claim in Suit 332, there was in law, no legal basis upon which the interlocutory injunction granted could be extended, whether upon terms or otherwise. (paras 70 & 71)

(4) The JID could not be faulted as it was based on a valid judgment obtained in the liability action, which had not been set aside or impeached. The insurer could have applied to set aside the JID but failed to do so, and instead, chose to file a separate action to impeach the JID. The claim to impeach the JID in the recovery action was dismissed. Hence, the claimant's conduct in defending Suit 332 could not be faulted. (paras 87-89)

(5) The primary concern of a declaration under s. 96(3) of the RTA is the validity or enforceability of the contract of insurance between the insurer and the insured. There was no allegation in the statement of claim in Suit 121 that the insurer had repudiated or terminated the insurance policy whether by reason of any breach on the part of the insured or for any other reason. The proper venue to contest the claimant's claim, the validity of which was, in substance, the insurer's complaint, was in the liability action, and not by way of a collateral action in an application for a declaration under s. 96(3) of the RTA. In not contesting the claimant's claim in the liability action, the insurer had allowed the claimant the opportunity to prove his claim in that suit and in respect of which a valid judgment had been entered. Until that judgment was set aside it was valid and enforceable. (paras 93-96)

(6) The claimant, the insured and the rider could not be faulted for defending Suits 121 and 332 and the orders for costs against them could not be justified. There were no special grounds connected with Suits 121 and 332 such as would displace the general rule that costs are to follow the event and that the successful parties should be awarded costs. (paras 97 & 98)

Case(s) referred to:

Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd [2015] 9 CLJ 821 CA ***(refd)***

Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Chia Tien Foh & Ors v. Lo Man Heng & Ors [2015] 1 LNS 1219 CA ***(refd)***

Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd [2003] 3 CLJ 532 CA ***(refd)***

CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd [2014] 9 CLJ 1012 FC ***(refd)***

Donald Campbell & Co Ltd v. Pollak [1927] AC 732 ***(refd)***

Hew Hooi Chun v. KL Teksi Radio Bhd [2010] 4 CLJ 657 CA ***(refd)***

Isaacs v. Robertson [1985] AC 97 ***(refd)***

Jayakumar Rajoo Mohamad v. CIMB Aviva Takaful Bhd [2015] 9 CLJ 552 CA ***(refd)***

Kazakhstan Kagazy v. Zhunus [2016] EWHC 1048 (Comm) ***(refd)***

Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd [2011] 5 CLJ 866 CA ***(refd)***

Masri v. Consolidated Contractors [2009] QB 503 ***(refd)***

Mohamed Hussin & Anor v. Hashim Said [1977] 1 LNS 72 HC ***(refd)***
Nishimatsu Construction Co Ltd v. Kecom Sdn Bhd [2008] 6 CLJ 149 CA ***(refd)***
Ottway v. Jones [1955] 2 All ER 585 ***(refd)***
Pacific & Orient Insurance Co Bhd v. Goh Cheng Loong & Ors [2013] 1 LNS 1002 HC ***(refd)***
Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***
Pacific & Orient Insurance Co Bhd v. Rasip Hamsudi & Ors [2017] 4 CLJ 572 CA ***(refd)***
Ritter v. Godfrey [1920] 2 KB 47 ***(refd)***
Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***
Siskina (Owners of Cargo Lately Laden on Board) and Others Respondents and Distos Compania Naviera S.A. Appellants [1979] AC 210 ***(refd)***
Sivakumar Varatharaju Naidu v. Ganesan Retanam [2009] 1 LNS 979 HC ***(refd)***
Tenaga Nasional Bhd v. Teobros Development Sdn Bhd [2008] 1 LNS 395 CA ***(refd)***
Yeap Tick In v. Pacific & Orient Insurance Co Bhd [2020] 4 CLJ 500 CA ***(refd)***

Legislation referred to:
Road Transport Act 1987, s. 96(3)

For the appellant - R Kamalanathan & Vinod R Kamalanathan; M/s Vinod Kamalanathan & Assocs
For the respondent - Ellen Cheran, V Gobi & Mendeep Singh; M/s V Gobi & Assocs G Ravi; M/s G Ravi

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: WA-22NCC-332-08-2017 & WA-22NCC-121-04-2017 (overruled in part).]

Reported by S Barathi

JUDGMENT

Darryl Goon Siew Chye J:

[1] There were two appeals before the court, each with a cross-appeal, and the appeals shall be referred to as Appeal 1704 and Appeal 1711.

[2] These appeals and cross-appeals were in respect of a decision of the High Court in Kuala Lumpur handed down on 16 August 2019 in respect of two separate suits which were consolidated and tried together.

[3] The two separate suits were:

(i) Kuala Lumpur High Court Guaman Sivil No. WA-22NCC-332-08-2017 ("Suit 332") and

(ii) Kuala Lumpur High Court Guaman Sivil No. WA-22NCC-121-04-2017 ("Suit 121").

[4] As the learned trial judge quite rightly pointed out, the background to these suits is necessary for the circumstances in which they were brought. For the purposes of this judgment we will, in the main, adopt the definitions used by the learned judge as they are both suitably descriptive and apt.

Background

[5] Suit 332 and Suit 121 came about in a somewhat convoluted manner.

[6] These two suits were among five separate suits that arose out of a single accident involving two motorcyclists.

[7] Shahrul Iman bin Abdullah ("claimant") claimed that on the evening of 13 April 2014 while riding his motorcycle registration number BLU 3306, a motorcycle with registration number BLQ 1049 ridden by Yahya bin Yacob ("rider") collided into him from the rear.

[8] The motorcycle BLQ 1049 was not owned by the rider but by Navin Naicker a/l Vijayan ("insured").

[9] The motorcycle BLQ 1049 was insured by Pacific & Orient Insurance Co Berhad ("insurer") under an Insurance Policy No. 01-70-13-KR4-002518 with Certificate of Insurance No. 017013KR4002518 for the period 22 October 2013 to 21 October 2014 ("insurance policy").

"Liability Action": Shah Alam Sessions Court Summons No. A53KJ-725-10-2015

[10] Following the accident, the claimant brought Shah Alam Sessions Court Summons No. A53KJ-725-10-2015 ("liability action") against the rider and the insured for damages suffered arising from the accident.

[11] Being made aware of this suit, the insurer, who might ultimately be liable based on the provisions of the Road Transport Act 1987 ("RTA"), appointed solicitors to represent the insured in the liability action. In addition, the insurer also applied, successfully, to be added as a party to the liability action.

[12] On 26 October 2016 however, the insurer applied and obtained an order to remove itself as a party to the liability action.

[13] This was because by then the insurer had obtained a declaration from the High Court in Kuala Lumpur on 28 July 2016, pursuant to s. 96(3) of the RTA, to the effect that the insurance policy was void and unenforceable.

[14] Subsequently, on 16 February 2017 and after a trial, judgment was obtained by the claimant against the rider and the insured in the liability action.

[15] There was no appeal against this judgment in the liability action.

"RTA OS": Kuala Lumpur High Court Originating Summons No. WA-24NCC-180-04-2016

[16] Prior to judgment being entered in the liability action, in April of 2016, the insurer had commenced Kuala Lumpur High Court Originating Summons No. WA-24NCC-180-04/2016 ("RTA OS") naming the insured as the defendant.

[17] In the RTA OS, the insurer had sought to declare the insurance policy void and unenforceable pursuant to s. 96(3) of the RTA.

[18] The basis for the declaration sought was because it was maintained that, as a matter of fact, the accident between the claimant and the rider did not happen. Thus, it was essentially contended that there was an attempt to defraud the insurer.

[19] Reliance was placed by the insurer on its adjuster's preliminary report and a statutory declaration affirmed by the insured on 17 February 2016 that the alleged accident did not occur. In this statutory declaration the insured, among other things, denied lending the rider his motorcycle BLQ 1049, and claimed that he did not know the claimant and denied that his motorcycle BLQ 1049 was involved in the accident.

[20] However, and notwithstanding his statutory declaration, the insured contested the RTA OS and the declaration sought. He affirmed an affidavit on 12 May 2016 stating that he did lend the rider his motorcycle BLQ 1049. He denied the contents of his earlier statutory declaration of 17 February 2016 stating that a representative of the insurer had told him to deny involvement in the accident and to sign the statutory declaration. The insured maintained that the insurer's representative had told him that the purpose for the statutory declaration was to enable the insurer to assist him against any claim by the claimant.

[21] On 28 July 2016, after hearing the RTA OS, the learned High Court Judge found in favour of the insurer and granted the declaration sought.

[22] It was following this declaration that the insurer withdrew as a party to the liability action. This step taken by the insurer turned out to be premature.

[23] The insured appealed the decision of the learned judge of 28 July 2016 in the RTA OS.

[24] On 3 March 2017, the Court of Appeal allowed the insured's appeal. It was directed by the Court of Appeal that an action by way of a writ be commenced by the insurer for the declaration sought under s. 96(3) of the RTA and the issue of what was essentially an allegation of fraud be determined by way of a trial.

[25] Hence, Suit 121 was filed by the insurer in April 2017 seeking the same declaration that it had sought in the RTA OS, ie, that the insurance policy be declared void and unenforceable pursuant to s. 96(3) of the RTA.

[26] By the time Suit 121 was filed, judgment had been entered in the claimant's favour in the liability action, on 16 February 2017.

"Recovery Action": Shah Alam High Court Civil Suit No. BA-22NCVC-296-05-2017

[27] In May of 2017, about two months after having obtained judgment in the liability action, the claimant brought Shah Alam High Court Civil Suit No. BA-22NCVC-296-05-2017 ("recovery action") against the insurer.

[28] It was not disputed that the writ was served on the insurer. However, the insurer had overlooked instructing its solicitors.

[29] As such, on 1 June 2017, judgment in default ("JID") of appearance was entered against the insurer in the recovery action.

[30] The JID was to the effect that the insurer was to pay the claimant damages in the sum of RM3,032,862.20 plus interest at the rate of 5% per annum until full payment. This was based on the judgment entered in the claimant's favour in the liability action.

[31] No application was made by the insurer to set aside the JID of appearance.

Suit 121 And Suit 332

[32] It was in light of the foregoing background that Suits 121 and 332 were filed.

[33] Suit 121, as mentioned, was filed in April 2017 and was brought by the insurer under s. 96(3) of the RTA against the insured and the rider for a declaration that the insurance policy was void and unenforceable. This was after the Court of Appeal had allowed the insured's appeal in the RTA OS.

[34] Suit 332 was filed in August 2017 and was brought by the insurer against the claimant, as the defendant, to impeach the JID in the recovery action on grounds of alleged fraud.

[35] On 22 November 2017, in Suit 332, an interlocutory injunction was granted by the learned judge prohibiting the claimant from enforcing the JID in the recovery action until the disposal of Suit 332.

Decision Of The High Court

[36] Following the trial, the learned judge dismissed the insurer's claims in both Suit 121 and Suit 332.

[37] Having heard the evidence, the learned judge concluded that there was a conspiracy to defraud the insurer. The learned judge concluded that the insurer had proven that the motor accident between the claimant and the rider did not actually occur and that there was an attempt to make a false claim against the insurer.

[38] However, the learned judge found that he was obliged to dismiss the insurer's action in Suit 332 as the JID obtained in the recovery action was based on a valid judgment ie, the judgment obtained in the liability action,

and which judgment was never appealed against or set aside. There was thus nothing fraudulent about the JID obtained in the recovery action. As the learned judge observed:

> Even if the Sessions Court judgment were to be assailed on the basis that it had been obtained by fraud, no similar allegation can be levelled at the High Court judgment in the recovery proceedings. The insurers sought to impeach not the Sessions Court judgment in the liability action, but rather the High Court judgment in the recovery action.

[39] In addition, the learned judge observed that the proper course was for the insurer to contest the recovery action. The insurer could have and should have applied to set aside the JID in the recovery action as it was a named party. Service of process on the insurer in respect of the recovery action was not disputed.

[40] As for Suit 121, it was dismissed because it was brought after judgment had been entered against the rider and the insured by the claimant. Having regard to the provisions of s. 96(3) of the RTA, the learned judge concluded that the insurer could no longer secure a declaration thereunder after the claimant had obtained judgment in the liability action.

[41] Although having dismissed both the suits, the learned judge nevertheless ordered that the interlocutory injunction granted in Suit 332 be maintained. In the learned judge's grounds of judgment, it was stated that the injunction granted was to be maintained upon terms, namely, until the earlier of the following:

(i) the dismissal of an application by the insurer to set aside the JID obtained in the recovery action; or

(ii) judgment having been entered against the insurer on the merits of the recovery action.

The parties were also given liberty to apply to vary the injunction.

[42] The sealed judgment that was finally extracted by the parties was worded somewhat differently. The relevant paragraph reads as follows:

> (c) Perintah injunksi terhadap perlaksanaan Penghakiman Ingkar bertarikh 1.6.2017 dari Mahkamah Tinggi Shah Alam tersebut masih berterusan dan berkuatkuasa sehingga keputusan permohonan mengenepikan penghakiman ingkar bertarikh 1.6.2017.

[43] In addition, and despite the dismissal of both the insurer's suits, costs were awarded in the insurer's favour against the insured and the rider in Suit 121 and against the claimant in Suit 332.

Appeals 1704 And 1711

[44] Appeal 1711 was the insurer's appeal against the High Court's refusal to grant the declaration sought in Suit 121 and against the High Court's refusal to impeach the JID in the recovery action sought in Suit 332, ie, the dismissal of the insurer's claims in both suits.

[45] A cross-appeal was filed by the insured and the rider in Appeal 1711 against the decision of the High Court in ordering costs against them in favour of the insurer in Suit 121, even though the insurer's claim was dismissed.

[46] Appeal 1704 was the claimant's appeal against that part of the learned High Court Judge's decision in maintaining the interlocutory injunction granted in Suit 332 and in ordering costs against the claimant, despite dismissing the insurer's claim.

[47] A cross-appeal was filed by the insurer in Appeal 1704; however, the cross-appeal was withdrawn on the day the appeals were heard. Accordingly, the insurer's cross-appeal was struck out.

[48] It is convenient that Appeal 1711 be dealt with first as it concerned the dismissal of both the insurer's claims in Suits 121 and 332.

Appeal 1711: Insurer's Appeal Against The High Court's Refusal Of Declaration Sought In Suit 121

[49] As mentioned, the declaration sought by the insurer in Suit 121 was that the insurance policy was void and unenforceable pursuant to s. 96(3) of the RTA.

[50] The relevant subsections to s. 96 of the RTA state as follows:

> **Duty of insurers to satisfy judgements against persons insured in respect of third party risks**
>
> 96(1) If, after a certificate of insurance has been delivered under sub-s. 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
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> ...
>
> (3) No sum shall be payable by an insurer under subsection (1) if **before the date the liability was incurred**, the insurer had obtained a **declaration from a court that the insurance was void or unenforceable**:

A

> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the
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> plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.
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> (emphasis added)

C

[51] It is important to note that Suit 121 was commenced by the insurer against the insured and the rider in April 2017 after judgment was obtained by the claimant against the insured and the rider in the liability action on
D 16 February 2017.

[52] Although evidence was led in support of the insurer's contention that the accident was in fact a "hit and run" and that there was a conspiracy to defraud the insured, there was first the threshold question as to whether the declaration sought was still available to the insurer under s. 96(3) of the
E RTA.

[53] The operative phrase in s. 96(3) on this issue is, "... if before the date liability was incurred ...".

[54] *Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd* [2015] 9 CLJ 821; [2015] 6 MLJ 223, was a case in which the
F decision of this court turned on that very phrase.

[55] In *Ahmad Nadzrin* (*supra*), after considering s. 93 in its entirety and the legislative intent that could be distilled, this court concluded by affirming the decision of His Lordship Vazeer Alam Mydin Meera JC in *Pacific & Orient*
G *Insurance Co Bhd v. Goh Cheng Loong & Ors* [2013] 1 LNS 1002, a decision that was delivered when His Lordship was still a Judicial Commissioner. In *Ahmad Nadzrin*, Lim Yee Lan JCA, stated:

> [70] I am also in agreement by the views express by His Lordship Justice Vazeer in the case of *Pacific & Orient Insurance Co Berhad v. Goh Cheng Loong*
H
> *& Ors* [2013] 1 LNS 1002 an unreported decision and to the judgment at pp. 11 and 12 and I quote:
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> > [16] *A careful reading of s 96(3) of the Road Transport Act 1987 shows that the insurer can repudiate liability only if, before liability was incurred, the insurer has obtained a declaration from the court to the effect that the*
I
> > *policy of insurance is void or unenforceable*. Here, the statutory liability for the plaintiff to pay would arise from the operation of s 96(1) of the Road Transport Act 1987 which reads:

> If, after a certificate of insurance has been delivered under sub-s 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under para 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
>
> [17] *Therefore, it is abundantly clear that the insurer's statutory liability to pay would come about when judgment in respect of any such liability as is required to be covered by a policy under para 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy* and the requisite notice under s 96(2) of the Road Transport Act 1987 has been given by the claimant, provided that the other provisos in s 96(2) did not apply. *Once that liability has arisen the insurer cannot avail itself of the provisions of s 96(3) of the Road Transport Act 1987 to seek declaratory relief to repudiate liability*. In this case, that judgment on liability pursuant to s 96(3) would be the judgment of the Sessions Court in the Sessions Suit, which has been delivered. Therefore, the liability in respect of the policy issued to the first defendant has arisen and incurred by the plaintiff and any declaration issued by this court subsequent thereto pursuant to s 96(3) of the Road Transport Act 1987 would be redundant and would be of no use to the plaintiff to avoid liability. In this regard, I agree with submissions of counsel for the third defendant that, this application is an abuse of the court's process.
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> Again the reasoning with which I agree with.
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> (emphasis added)

[56] Prasad Sandosham Abraham JCA (as His Lordship then was), in *Ahmad Nadzrin*, observed in respect of s. 96(3) of the RTA that:

> [69] Having perused all the cases, it is my considered view that the words that I referred to earlier must mean that the respondent is entitled to obtain a declaration from court that its policy was void and/or unenforceable **before judgment was entered against the respondent which in our view is when liability will be incurred by the respondent**. If s 96(1) of the said Act is looked at, particularly the words "judgment in respect of any such liability as is required to be covered by a policy under para 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy" supports that proposition. In our present case the learned judge followed *Kurnia Insurans (Malaysia) Bhd v.*

A *Kein Hing Appliances Sdn Bhd* (Shah Alam High Court OS 24-2979-12/2011) and the judgment of the Ladyship Hadhariah J whose reasoning I agree. This particular case went on appeal to this court and the judgment was upheld ...

(emphasis added)

B **[57]** Judgment, however, had not been entered against the alleged tortfeasor in *Ahmad Nazrin* and, as such, the objection taken against a declaration sought under s. 96(3) of the RTA was dismissed.

[58] In *Jayakumar Rajoo Mohamad v. CIMB Aviva Takaful Bhd* [2015] 9 CLJ 552, this court also came to the same conclusion in respect of s. 96(3) of the C RTA and the phrase "before the date the liability was incurred". In the judgment of the court delivered by Vernon Ong Lam Kiat JCA (as His Lordship then was), His Lordship stated:

Meaning Of Words 'The Date The Liability Was Incurred' Of Sub-s. (3)

D [26] As a starting point, the proviso to the subsection should be read together with the subsection. **Subsection (3) provides that the insurer shall not be liable to pay any sums if "before the date the liability was incurred" the insurer has obtained a declaration from a court**. The proviso to sub-s. (3) also provides that the insurer will not benefit from the subsection if the application for the declaration was made "as respects E any judgment obtained in proceedings commenced before the commencement of the action ...". **Put another way, the proviso provides that the insurer will still be liable if the application for the declaration was only made after judgment was obtained**.

[27] **In our judgment, a reading of the proviso would clearly advance the** F **meaning of "the date the liability was incurred" and which date is the date when judgment has been obtained**.

[28] In a running down action, the plaintiff's claim for damages is based on the tort of negligence. Prior to the trial of the action, liability in damages has not yet been incurred. What the plaintiff has is a cause of G action in negligence which, if proven, will subject the defendant to liability in damages. **Therefore, "the date liability is incurred" within the meaning of sub-s. (3) must be held to have the meaning that liability is only incurred when judgment on liability is pronounced by a court after full trial**.

H [29] **In this instant case, no judgment has been obtained; the action having been withdrawn by the appellant with liberty to file afresh. When the application for the declaration** by the respondent was filed, there was no judgment. As such, the proviso does not apply to deny the respondent of the benefit of the declaration it had obtained. Consequently, the respondent is entitled to the benefit of the declaration I obtained pursuant to sub-s. (3) of the s. 96 of the RTA 1987.

(emphasis added)

[59] Relying on the decision of this court in *Jayakumar Rajoo Mohamad (supra)* on the meaning of the phrase "the date the liability was incurred" in s. 96(3) of the RTA, the learned judge refused the declaration sought by the insurer as by the time Suit 121 was filed, judgment had already been entered in favour of the claimant in the liability action.

[60] In our view, the authorities on this point have been clear and consistent. A declaration under s. 96(3) of the RTA is no longer available after a judgment has been granted in favour of a claimant ie, after the date liability had been incurred. The learned judge was clearly correct in concluding as he did and in dismissing the insurer's claim in Suit 121.

Appeal 1711: Insurer's Appeal Against The High Court's Refusal To Set Aside The JID In The Recovery Action And Dismissal Of Suit 332

[61] In *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 at pp. 92 to 93, Mohd Azmi FCJ, stated:

> *It is of course settled law as laid down by the Federal Court in Hock Hua Bank case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction*. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction* so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld *the existence of a category of orders of the court* "*… which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make*.
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> The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, "*save that specifically it includes orders that have been obtained in breach of rules of natural justice*". Similarly, in this country the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37 @ 39 provides the correct guideline on the subject:
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> > The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; *it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent*. … (emphasis added)

[62] In *Badiaddin* (*supra*), Mohd Azmi FCJ went on further to state:

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the Superior Courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened "any written law", the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[63] The ambit as to when the High Court may set aside a final judgment of another High Court regularly obtained was addressed in *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673 at pp. 692 - 693 when, in delivering the judgment of the Federal Court, Abdull Hamid Embong FCJ stated:

> [31] *It is settled law that the High Court cannot set aside a final judgment/order regularly obtained from another High Court unless the judgment was made in defiance of a substantive statutory prohibition which renders it null and void on the grounds of illegality or lack of jurisdiction. Only in that exceptional case can a defective judgment be struck out ex debito justitiae*. It is thus only in this situation that a High Court may exercise its inherent jurisdiction to strike out a regularly obtained judgment of another court of concurrent jurisdiction. (see: *Badiaddin*'s case)
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> [32] The Court of Appeal in *Selvam Holding* said that besides the situation above, *Badiaddin* seemingly had "extended the scope and extent of the inherent and discretionary jurisdiction of a court" to set aside an order "where in exceptional cases, the justice of the case requires the court to intervene and correct an earlier order that contains a serious defect and there is a need to have it set aside".
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> [33] *We have carefully re-examined Badiaddin and could not find anywhere in its ratio to say that the court's inherent jurisdiction has an extended scope to correct an earlier regular judgment or order in exceptional circumstances other than where the judgment had been granted in contravention of a statute.*
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> (emphasis added)

[64] In *CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd* [2014] 9 CLJ 1012 the Federal Court adopted and reproduced the views held by the Court of Appeal in *Hew Hooi Chun v. KL Teksi Radio Bhd* [2010] 4 CLJ 657, which further elucidated the jurisdiction of the court in setting aside a judgment of another court, stating as follows:

[11] In *Hew Hooi Chun v. KL Teksi Radio Bhd* [2010] 4 CLJ 657; [2011] 3 MLJ 754, the Court of Appeal imparted the following commentary on *Badiaddin*, which we wholly adopt:

…

> In *Badiaddin*, *the Federal Court settled that there is inherent and discretionary jurisdiction to set aside ex debito justitiae an order of court regularly obtained where there has been a breach of the rules of natural justice following the Privy Council case of Isaacs v. Robertson* [1985] AC 97. However, the Federal Court cautioned "that in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction.
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> *The contravention must be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction* (in *MacQuire (Malaysia) Sdn Bhd v. HSBC Bank Malaysia Bhd & Anor and Another Appeal* [2007] 6 CLJ 176, *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia & Ors (Intervenors)* [2003] 1 CLJ 465 HC, and *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666, the Court of Appeal applied *Badiaddin* per Mohd Azmi). In *Badiaddin*, the contravention defied a substantive statutory prohibition contained in the Malay Reservations Enactment. In *Meenakshi Naidoo v. Subramaniya Sastri* LR 14 1A 160 (cited by Gopal Sri Ram JCA, as he then was, in *Badiaddin*), the High Court at Madras purported to entertain an appeal which was not appealable. And in *Chief Kofi Forfie v. Barima Kwabena Seifah* [1958] AC 59; [1958] 1 All ER 289 (also cited by Gopal Sri Ram JCA, as he then was, in *Badiaddin*), the judgment was delivered when the presiding judge of the Chief Commissioner's Court had no power to exercise judicial functions. *There must be "a breach of the rules of natural justice or a contravention of a statute which is a sine qua non to invoke the very limited jurisdiction of a court to have its orders declared as void*" (*Annie Quah Lay Nah v. Syed Jafer Properties Sdn Bhd & Ors And Another Appeal* [2007] 1 CLJ 1 per Gopal Sri Ram JCA). *The order must be tainted by "fraud or some other vitiating element and not a judgment that was merely irregular in the sense that it is one obtained in breach of a rule of court or of practice* (*Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 CLJ 532 per Gopal Sri Ram JCA).
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> (emphasis added)

[65] Thus, as a "special exception", a final judgment of a High Court may only be set aside and struck out *ex debito justitiae* by another High Court, in the exercise of its inherent jurisdiction, upon grounds of breach of the rules of natural justice, illegality or lack of jurisdiction.

[66] There was no indication that the JID in the recovery action was otherwise than regularly obtained. As indicated, the insurer was served but had failed to enter an appearance. In any event, there is authority enough for the proposition that mere irregularity in procedure would not suffice to warrant the invocation of the court 's inherent jurisdiction to set aside the judgment of another court (see *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 CLJ 532 referred to in *Hew Hooi Chun* (*supra*)).

[67] In addition, it would be observed that the fraud alleged by the insurer was in respect of the claim upon which judgment was obtained in the liability action. Until that judgment is set aside in an action brought for that purpose, it remains a valid and enforceable judgment that cannot be ignored.

[68] The JID in the recovery action was itself untainted by the allegation of fraud. It was premised on the judgment in the liability action. There was also nothing to suggest that the JID itself was affected by any want, or excess of jurisdiction, or that it was tainted by any other illegality or breach of the rules of natural justice.

[69] We were therefore in complete agreement with the learned judge that the JID in the recovery action could not be impeached or set aside. Clearly, the obvious recourse the insurer had was to apply to set aside the JID and to contest the recovery action (see *Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd* [2011] 5 CLJ 866; [2011] 4 MLJ 541).

Appeal 1704: Claimant's Appeal Against Continuation Of The Injunction

[70] Upon dismissal of the insurer's claim in Suit 332, there was in law no legal basis upon which the interlocutory injunction granted could be extended, whether upon terms or otherwise.

[71] The injunction that was extended would have the indirect effect of precluding the claimant's enforcement of the judgment obtained in his favour in the liability action against the insurer; leaving aside the issue whether the order in the recovery action was at all necessary in the first place (see *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947; and *Pacific & Orient Insurance Co Bhd v. Rasip Hamsudi & Ors* [2017] 4 CLJ 572). It has to be borne in mind that the judgment obtained by the claimant in the liability action remains valid and was never set aside or appealed against.

[72] An injunction is a remedy and it has to be supported by a valid cause of action. As Lord Diplock observed in the *Siskina (Owners of Cargo Lately Laden on Board) and Others Respondents and Distos Compania Naviera SA Appellants* [1979] AC 210 at p. 256:

> A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the

> enforcement of which the defendant is amenable to the jurisdiction of the court. *The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction*.
>
> Since the transfer to the Supreme Court of Judicature of all the jurisdiction previously exercised by the Court of Chancery and the courts of common law, the power of the High Court to grant interlocutory injunctions has been regulated by statute. *That the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment, was first laid down in the classic judgment of Cotton L.J.* in *North London Railway Co. v. Great Northern Railway Co.* (1883) 11 Q.B.D. 30, 39-40, which has been consistently followed ever since.
>
> (emphasis added)

[73] Lord Diplock's statement of the law was referred to by Gopal Sri Ram JCA (as His Lordship then was) in a decision of this court in *Nishimatsu Construction Co Ltd v. Kecom Sdn Bhd* [2008] 6 CLJ 149; [2009] 2 MLJ 404 where at p. 151 (CLJ); p. 406 (MLJ), His Lordship stated as follows:

> [3] In our judgment the injunction applied for should have not been granted because there was no pleading against the appellant on which the injunction could issue. **It is settled law that the right to obtain an interlocutory injunction is not a cause of action. There must be a cause of action pleaded in the usual fashion before an interlocutory injunction may be applied for and obtained**. We consider it unnecessary to do more than refer to the following passage in the speech of Lord Diplock in the *Siskina (Cargo Owners) v. Distos Compania Naviera SA* [1979] AC 210 at p 256 ...
>
> (emphasis added)

(See also *Tenaga Nasional Bhd v. Teobros Development Sdn Bhd* [2008] 1 LNS 395; [2008] 6 MLJ 391; and *Sivakumar Varatharaju Naidu v. Ganesan Retanam* [2009] 1 LNS 979; [2010] 7 MLJ 355).

[74] Although in recent times, the principle enunciated in the *Siskina* (*supra*) and its stringency have attracted reservations and reconsideration urged (see *Kazakhstan Kagazy v. Zhunus* [2016] EWHC 1048 (Comm) at para. 58) with exceptions created (eg, in respect of anti-suit injunctions, see *Masri v. Consolidated Contractors* [2009] QB 503), no such exception however existed or was raised in respect of Suit 332.

[75] A similar situation was encountered in *Yeap Tick In v. Pacific & Orient Insurance Co Bhd* [2020] 4 CLJ 500; [2020] MLJU 223. In that case, two causes of action were mounted by the plaintiff. Despite having dismissed the plaintiff's causes of action, a permanent injunction was granted against the defendant.

[76] In delivering the judgment of the court in *Yeap Tick In* (*supra*), Harmindar Singh Dhaliwal JCA (as His Lordship then was) stated:

> [9] There was no dispute that the respondent here had initiated two causes of action against the appellant, that is, the torts of malicious prosecution and abuse of the court process. *It was also plain that after due consideration, both causes of action were dismissed by the learned judge*. Now, there were no appeals by either side on these findings. The parties are then taken to be bound by these findings and it was not open to this court to revisit these findings.
>
> [10] *Having so dismissed the claims of the respondent, it is our respectful view that the learned judge had no jurisdiction to grant any relief to the respondents. In other words, before any relief is granted, whether in the form of damages or other relief, the causes of action must be firmly established*. Curiously enough, the learned judge thought it fit to grant what appeared to be a permanent injunction against the appellant from proceeding with any enforcement proceedings against the respondent. We will come to the reasons why the learned judge did so in a moment.
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> (emphasis added)

[77] Similarly, having dismissed the insurer's claim in Suit 332, there was no legal foundation upon which the interlocutory injunction granted could be extended.

[78] While we have no doubt that the learned judge in extending the injunction was persuaded by his finding that there was a conspiracy to defraud the insurer, however, there are legal limits to what courts may do in respect of what it may perceive to be the justice of the case.

Appeals 1704 And 1711: Claimant's Appeal And Cross-appeal Against The Costs Ordered

[79] There were then the costs ordered against the claimant in favour of the insurer in Suits 121 and 332. While costs are always a matter of discretion for the court, it is trite that such discretion must be exercised judicially and upon relevant and appropriate material before the court.

[80] In *Chia Tien Foh & Ors v. Lo Man Heng & Ors* [2015] 1 LNS 1219, Vernon Ong Lam Kiat JCA (as His Lordship then was) stated that:

> [40] The power of the court to award costs is provided under Item 15 of the Schedule in the Courts of Judicature Act 1964. *It is a discretionary power which must be exercised judicially, ie, in accordance with established principles and in relation to the facts of the case, which includes any matter relating to litigation, the parties' conduct in it and the circumstances leading to the litigation, but nothing else*. If there are no grounds for departing from the normal rule or the judge acts on extraneous grounds he has in effect not exercised his discretion at all (see *Scherer & Anor v. Counting Instruments Ltd & Anor* [1986] 2 All ER 529 (CA)).

> [41] As a general rule, *costs follow the event and the successful party is entitled to be paid his costs unless there are special grounds to order otherwise*, and those grounds, it is well settled, must be grounds connected with the cause of action (per Parker LJ in *Ottway v. Jones* [1955] 2 All ER 585 at page 591).
>
> (emphasis added)

In that case, the learned judge's order of costs in the plaintiff's favour was not set aside as the cause of action arose from the breach of an agreement by the defendants.

[81] In *Ottway v. Jones* [1955] 2 All ER 585 at p. 591, Parker LJ stated as follows:

> It is, I think, clear that the discretion of the county court judge under the County Court Rules, 1936, Ord 47, r. 1, just as that of a High Court judge under s. 50(1) of the Supreme Court of Judicature (Consolidation) Act, 1925, is, on the face of it, completely unfettered. *I say "on the face of it" because, of course, the discretion cannot be exercised arbitrarily; it must be exercised judicially and on fixed principles dictated by reason and justice. One starts with this, that, as a general principle, costs follow the event, and the successful party is entitled to be paid his costs unless there are special grounds to order otherwise, and those grounds, it is well settled, must be grounds connected with the cause of action. No doubt, also, where a plaintiff has wholly failed to establish his title or his right, it is impossible judicially to order the successful defendant to pay the plaintiff's costs.*
>
> (emphasis added)

[82] In *Donald Campbell & Co Ltd v. Pollak* [1927] AC 732 at pp. 811 to 812, Viscount Cave LC stated:

> A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the court awards them to him, and *the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case.*
>
> (emphasis added)

[83] In identifying what those reasons might be, the learned judge referred to the decision of the Court of Appeal in *Ritter v. Godfrey* [1920] 2 KB 47 where Atkin LJ stated:

> It is not easy to deduce from these authorities what the precise principles are that are to guide a judge in exercising his discretion over costs. And yet as the discretion is only to be exercised where there are materials upon which to exercise it, it seems important to ascertain the principles upon which a judge is to discern whether the necessary materials exist. *In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation,*

or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains. These principles require further expansion.

By (1) is meant – has so conducted himself as to lead the plaintiff reasonably to believe that he had a good cause of action against the defendant, and so induce him to bring the action. The authority for this proposition is *Bostock v. Ramsey*. (1) It is wide, for in terms it is not limited to unreasonable or improper conduct, or to conduct other than that which constitutes the alleged cause of action. Inasmuch as the bringing of many actions of contract and most actions of tort is due to the effect upon the plaintiff's mind of defendant's conduct, and the effect is at any rate to induce a belief that the plaintiff has a good cause of action, *it would appear to follow that provided the belief was reasonable the judge in all such cases has grounds for depriving a successful defendant of costs*. I presume *e converso* there would be grounds for dealing with a successful plaintiff's costs when his conduct has induced the defendant reasonably to believe that he has a good defence.

I am inclined to think therefore that the propositions in *Bostock v. Ramsey* (1) should be read subject to the first, if not also the second, of the limitations suggested above – i.e., subject to the conduct being unreasonable or improper, and being conduct other than that which constituted the alleged cause of action. For the purposes of this case, however, I shall assume that they are to be read without the qualification suggested. *(2) and (3) may possibly overlap. (2), I think, would include improper conduct in or connected with the litigation calculated to defeat or delay justice. Such conduct would also be included in (3), which, I think, further extends to cases where the facts complained of, though they do not give the plaintiff a cause of action, disclose a wrong to the public: King v. Gillard (2), by which I understand some criminal or quasi criminal misconduct*, e.g., a fraud or crime or preparation for a fraud or crime, or possibly some act of serious oppression. *Such conduct must, however, be in the course of the transaction complained of*. If there is evidence of facts falling within the three classes above mentioned, then an appellate court will not interfere with the discretion of the trial judge, even though they might not have come to the same finding of fact or exercised their discretion in the same way.

(emphasis added)

[84] As pointed out by the learned judge, both the cases *Donald Campbell & Co* (*supra*) and *Ritter* (*supra*) were cited with approval by the Federal Court in *Mohamed Hussin & Anor v. Hashim Said* [1977] 1 LNS 72; [1978] 1 MLJ 127.

[85] In *Mohamed Hussin* (*supra*) the plaintiff, a member of the armed forces met with an accident while travelling in a car driven by another member of the armed forces. A suit was filed against *inter alios* the driver and his employer, the Government of Malaysia. The applicable provision, s. 14 of the Government Proceedings Ordinance No. 58 of 1956, was interpreted such that the plaintiff's right of action would cease if *inter alia* a certificate

was issued by the Minister of Finance to the effect that the plaintiff would be compensated under service regulations. The relevant certificates, including one from the Minister of Defence, were issued but was only served on the plaintiff some 13 months after it was issued. As a result, the plaintiff's action was withdrawn. However, notwithstanding the plaintiff's withdrawal of the suit, costs were awarded to the plaintiff. The learned judge, with whom the Federal Court agreed, stated as follows:

> Until the certificate was issued plaintiff has a good common law cause of action against first and second defendants and as the 2 letters had been sent before he instituted the action and *there was no indication either from the Attorney-General's Chambers or the Ministry of Defence that such a certificate would be issued I considered it reasonable and proper that he be awarded the costs which he would not have incurred had the certificate been issued within a reasonable time after the two letters had been sent*. The last letter was sent more than a month before the action was instituted.
>
> (emphasis added)

[86] Thus, in *Mohamed Hussin*, the plaintiff had a good claim which was only rendered unnecessary after he was made aware that the relevant certificates had been issued.

[87] The circumstances in Suit 332 were, with respect, quite different. The learned judge had dismissed the claim to impeach the JID in the recovery action. The learned judge had concluded that the JID could not be faulted even if the judgment in the liability action may have been said to have been obtained by fraud, no doubt fundamentally because the JID was based on a valid judgment obtained in the liability action, which judgment itself had not been set aside or impeached.

[88] Indeed, the learned judge also pointed out that the insurer should have participated and contested the recovery action as it was a named party. Even if it had inadvertently omitted to instruct solicitors to defend the claim, the insurer could have applied to set aside the JID but failed to do so. Instead, the insurer chose to file a separate action to impeach the JID.

[89] The commencement of Suit 332 and its dismissal could not in the circumstances be attributed to any fault on the part of the claimant. Suit 332 was commenced by the insurer after judgment had been obtained in the liability action. The claimant's conduct in defending Suit 332 cannot be faulted as he had the law on his side. The claimant could not be faulted even in regard to the subject matter of the insurer's complaint because the insurer's complaint was in respect of the JID in the recovery action, which was a judgment that cannot be said to have been wrongfully or illegally obtained as it was based on a valid judgment in the liability action.

[90] Why the insurer did not take the more obvious step of impeaching the judgment in the liability action itself and/or applying to set aside the JID in the recovery action, are questions that may properly be posed. The court however, will not enter into any speculation as to what the answers might be.

[91] We observed that in the trial of Suits 121 and 332, the learned judge had gone into the evidence and had held that:

> 42. ... , I was satisfied that the insurer had proven that the accident had not occurred in the manner claimed by the claimant, and that as a consequence, there had been an attempt to make a false insurance claim against the insurer.

[92] In our view, a declaration under s. 96(3) of the RTA is one in respect of the validity or enforceability of an insurance policy. It is not a declaration as to the validity or otherwise of any claim that is or may be made against the policy. Fine though the distinction may be, it nevertheless exists.

[93] The primary concern of a declaration under s. 96(3) of the RTA is with the validity or enforceability of the contract of insurance between the insurer and the insured.

[94] In the case at hand, if it be proven that the accident did not take place as alleged by the claimant and the rider, all it would mean is that the claimant's claim will fail and the insured would not encounter any obligation to pay under the insurance policy. That *per se*, however, does not render the insurance policy itself void or unenforceable as a contract between the insurer and the insured. In this regard, it is observed that there was no allegation in the statement of claim in Suit 121 that the insurer had repudiated or terminated the insurance policy whether by reason of any breach on the part of the insured or for any other reason.

[95] It also follows that the proper venue to contest the claimant's claim, the validity of which was in substance the insurer's complaint, was in the liability action and not by way of a collateral action in an application for a declaration under s. 96(3) of the RTA.

[96] In not contesting the claimant's claim in the liability action, the insurer had in fact allowed the claimant the opportunity to prove his claim in that suit and in respect of which a valid judgment had been entered by the Sessions Court. That judgment remains a valid judgment of a court of law. Until that judgment is set aside it is valid and enforceable (see *Isaacs v. Robertson* [1985] AC 97; and *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75).

[97] In the circumstances, we do not see how the claimant, the insured or the rider could be faulted for defending Suits 121 and 332 or how the orders for costs against them, despite having successfully defended Suits 121 and 332, could be justified.

[98] We find no special grounds connected with Suits 121 and 332 such as would displace the general rule that costs are to follow the event and that the successful parties should be awarded costs.

Conclusion

[99] Suraya Othman JCA and Azizah Nawawi JCA have both perused and considered the draft of this judgment and have expressed their concurrence with it.

[100] For the reasons given above, the insurer's appeal in Appeal 1711 was dismissed with costs. The insured's and the rider's cross-appeals were allowed with costs here and below.

[101] As for Appeal 1704, the claimant's appeal was allowed with costs here and below and that part of the order of the High Court dated 16 August 2019 which extended the injunction granted against the claimant from enforcing the JID obtained in the recovery action and the costs ordered, were set aside.